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No. 97-1230

In The Supreme Court of the United States
October Term, 1997

CITY OF WEST COVINA,

Petitioner,

v.

LAWRENCE PERKINS, et al.

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* OF OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, HAWAII, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WASHINGTON, COMMONWEALTH OF VIRGINIA AND TERRITORY OF GUAM IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI

Amicus curiae State of Ohio and 29 other amici States and Territories write to support the City of West Covina in urging the Court to reverse the decision below. At stake are the due process requirements that States and their political subdivisions must follow in notifying their citizens how to retrieve property that has been seized in accordance with the terms of a lawfully-issued search warrant.

The issue has widespread application. In enforcing their criminal laws, the amici States, like many of their political subdivisions, frequently must return property that has been seized in the course of criminal investigations. Most States also regulate this matter by statute, with many relying on State laws that have been in place for some time. *See* Appendix. And many State highway patrols assume direct responsibility for ensuring that property seized during the course of an investigation is eventually returned.

The Ninth Circuit's decision creates doubt in an area of the law that once had certainty. Even though the police in this instance provided the property owners with the following information about the search -- the date of the search, the police department that conducted the search, the name of the court (and judge) that issued the search warrant, a list of the property seized, and the telephone number of the three officers involved in the case -- the lower court held that due process requires more. The amici States, to be sure, share the Ninth Circuit's animating concern that citizens have access to adequate procedures for obtaining the return of property. But we respectfully submit that the court's attempt to address that concern sidestepped the teachings of precedent, cast a shadow over long-accepted State laws and law-enforcement practices, and ultimately disserved the very goals it sought to advance. For these reasons and those elaborated below, we submit this amici curiae brief for the Court's consideration.

SUMMARY OF ARGUMENT

The City of West Covina satisfied the requirements of due process in this instance. Upon seizing respondents' property in the course of a criminal investigation, due process required the city to provide notice "reasonably calculated" to inform the residents where the property was and how to get it back. *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). That is just what the city did.

After executing a warrant to search respondents' house and after seizing several items of property in accordance with that warrant (including the $2,469 in cash and starter pistol at issue here), the police officers left a form at the house entitled "Search Warrant: Notice of Service." The form supplied the residents with the following information: the date of the search, the police department that conducted the search, a list of the property seized, the court (and judge) that issued the search warrant and had authority to return the property, and the name and telephone number of the three police officers involved in the search. By any measure of reasonable notice, this form sufficed. It supplied the residents with all the information they needed to retrieve their property while at the same time protecting the city's interest, to say nothing of the residents' interest, in ensuring that such property is returned only to its rightful owners and only after an appropriate court order authorizing its release.

The lower court erred in requiring more, namely a recitation of the number of the warrant governing the search and a recitation of the State laws allowing citizens to protest the seizure of property and obtain its return. Because no tenable showing has been made that the number of the search warrant was needed to retrieve the property, its absence simply did not transform the abundant information that was supplied into inadequate notice. The city likewise did not have an obligation to cite all State laws governing such matters for the same reason

that it need not cite the Fourth Amendment of the United States Constitution every time it notifies individuals that their residence has been searched. The point of notice is not to fuel litigation or to supply legal advice regarding the law governing seizures of property and their return during a criminal investigation. It rather is to identify the basic information each citizen needs to get his or her property back. West Covina did just that, and accordingly gave all the notice that was owed.

Nor do *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), and the other cases relied on by the Ninth Circuit lead to a contrary conclusion. Those decisions concern the right of citizens to protest the extinguishment of a property interest -- in *Memphis Light*, the termination of a basic utility service -- *before* it occurs. But in that unique setting, the case law aptly recognizes that a pre-deprivation opportunity to protest government action must be bundled with a right to notice of how and where to make that challenge. Here, in conspicuous contrast, the deprivation has already occurred. And on this record no further risk of intentional deprivation exists, whether by way of further transfer of the property, its complete destruction or its escheat to the State. The only question under these circumstances is how to get the property back. The notice supplied by the city amply served that task -- above all by disclosing the names of the court, judge and police officers with access to and custody over the property, together with the authority to see to its return. Notice of all laws governing such challenges not only exceeds the requirements of due process but also overlooks the time-honored requirement that "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). *See Texaco, Inc. v. Short*, 454 U.S. 516, 532-33 (1982). The lower court's contrary conclusion should be reversed.

ARGUMENT

In meeting their duty not to "deprive any person of life, liberty or property, without due process of law," U.S. Const. Amd. XIV, the States and their political subdivisions have long taken it upon themselves to notify citizens how to protest deprivations of property before they occur and how to retrieve property after it has been taken. Common ground exists on several fronts regarding the contours of that duty here.

All agree that the city in this instance had no duty to notify respondents about the seizure of their property *prior* to the search. Either the "necessity of quick action by the State" in executing a search warrant "or the impracticality of providing any meaningful predeprivation process" in such situations amply "satisfies the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981). The rigorous requirements for obtaining a search warrant thus provide all the process that is constitutionally due before the police execute a validly-issued search warrant.

All further agree that the city had an obligaton to provide notice of the search and seizure in order to give the owners an opportunity to get their property back. And all finally agree that the notice must have been "reasonably calculated" to apprise the residents where the property was and whom to contact about its return. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

What divides the litigants is whether the notice the city gave the property owners was in fact adequate. In holding that the notice failed to meet the minimim requirements of due process, the lower court made two essential mistakes. It misconstrued *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), which undermines rather than advances the Ninth Circuit's analysis. And it mistakenly equated the notice

requirements concerning a pre-deprivation hearing with those of a post-deprivation procedure. The decision should be reversed in its entirety.

I. The City's "Notice Of Service" Form Satisfies Due Process.

In advocating the type of notice that due process requires in this case, the amici States do not write on a blank slate. Two precedents, one general and one more specific, supply an agreed-upon framework for analyzing this issue. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court generally concluded that the requirements of procedural due process require consideration of three different factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, the Court offered more specific guidance regarding the application of this balancing of individual-property-interest/risk-of-deprivation/government-interest in the context of notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality," the Court stated, "is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

them an opportunity to present their objections." *Id.* at 314. At the same time, while the notice "must be of such nature as reasonably to convey the required information" to affected individuals, it must have "due regard for the practicalities and pecularities of the case." *Id.* at 314-15. The test thus "'is not the possibility of conceivable injury'" of any one individual "'but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.'" *Id.* at 315 (quoting *American Land Co. v. Zeiss*, 219 U.S. 47, 67 (1911)).

Whether one applies the *Mathews v. Eldridge* balancing test or the *Mullane* reasonable-notice test, the City of West Covina clearly passes. Under both inquiries, which ultimately require the same common-sense weighing of private and public interests, the city adequately notified respondents what had happened to their starter pistol and $2,469 in cash, who had custody of the property, and whom to contact about its return.

After conducting a search of respondents' house, the police left a form entitled "Search Warrant: Notice of Service." It conveyed the following information to the respondents about the search and seizure of their property:

> To Whom it May Concern:
>
> 1. These premises have been searched by peace officers of the West Covina Police Department pursuant to a search warrant issued on 5-20-93, by the Honorable Dan Oki, judge of the Municipal Court, Citrus Judicial District.
>
> 2. The search was conducted on 5-21-93. A list of the property seized pursuant to the search warrant is attached.

> 3. If you wish further information, you may contact: Det. Ferrari or Det. Melnyk at [the telephone number].

In addition to this information and an attached list of property seized during execution of the warrant, the form also disclosed the name of another officer with information about the search warrant, Lt. Schimanski, as well as that officer's telephone number. *Perkins v. City of West Covina*, 113 F.3d 1004, 1007 (9th Cir. 1997).

All told, the "Notice of Service" disclosed abundant information about the underlying search. It conveyed the date of the search, the police department that conducted the search, the names and telephone numbers of each of the three officers involved in the search, a complete list of the property seized, and the name of the court (and judge) that issued the search warrant and had authority to permit the property's return.

This information satisfied the city's due process duties. The form told respondents what had happened to their property, who had it, and whom to contact about getting it back. Above all else, the "Notice of Service" told them the court that had issued the warrant and had statutory authority to release the property. Armed with this information, respondents knew everything they needed to know to ensure that their property was ultimately returned. That it takes time to retrieve such property and that respondents were unsuccessful in initially getting it back does not undermine the process provided or the reasonableness of the notice given. To the contrary, it speaks well of West Covina in general and the State of California in particular that they do not permit easy releases of property seized in a search, in order to ensure that the property is returned only to its rightful owners and to ensure that the property is no longer needed in the criminal investigation. On this record, the city plainly provided notice "reasonably calculated" to its task.

II. *Memphis Light* Supports Rather Than Undermines This Analysis.

Far from changing matters, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, supports this analysis and this result. *Memphis Light* arose from a civil dispute about the termination of utility services and concerned the nature of the notice that must precede a utility's decision to halt these essential services. In holding that the termination notices must inform customers of the procedure for protesting a termination, the Court said the following:

> The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service.

Id. at 15.

Relying on this language, the lower court concluded that *Memphis Light* required West Covina to notify respondents about all State laws "for protesting the seizure of [their] property" and "the existence of a formal judicial procedure for obtaining return" of the property. 113 F.3d at 1012. This misreads *Memphis Light* in two critical respects.

To begin with, the notice supplied by West Covina does in fact meet the notice requirements of *Memphis Light*. There, the Court made clear that the adequacy of notice concerns "[f]undamental fairness, not simply considerations of courteous treatment of customers." 436 U.S. at 16 n.19 (quotation

omitted). It thus requires government only to provide "notice and the actual provision of a timely opportunity to meet with designated personnel who are duly authorized to review" the individual's concerns. *Id.* Because West Covina's notice told respondents who had the property and the names of the government officials who could obtain its return, the notice met the very requirements of *Memphis Light* on which the lower court relied.

True or not, the lower court made another error. It incorrectly equated the requirements of pre-deprivation notice with those of post-deprivation notice. The two procedures are different in purpose and different in kind. In the one setting, where the deprivation has immediate and important effects on a person's life or livelihood, the Court in a series of cases has required notice of the hearing before any deprivation occurs. *See, e.g., Mullane*, 399 U.S. 306 (personal notice to beneficiaries of a trust to be judicially settled necessary when whereabouts of beneficiaries known); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license under certain circumstances may not be suspended without a hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (hearing required before State may seize property in debtor's possession). In each of these cases, "deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur." *Parratt*, 451 at 538.

Memphis Light falls within this category of cases, and is controlled by them. It involved a procedure for discontinuing a vital utility service, and it was therefore entirely appropriate to require meaningful notice for resolving bill disputes -- a procedure provided not by State law but by the utility itself, 436 U.S. at 13-14 -- before the termination occurred.

As *Parratt v. Taylor* recognizes, however, remedies for retrieving property after it has been taken are different. 451 U.S. at 539. There is no pending hearing date, there is no need for immediate preparation for the hearing, and there is no risk of irreversible termination of the property interest. Without notice of the procedure for challenging a threatened utility termination in *Memphis Light*, these essential services could have been cut off. A similar problem informed *Mullane*, where trust beneficiaries could forever have lost their interest in the trust without notice of a pending settlement of accounts under State law.

But the same dilemma does not exist in a post-deprivation setting. The rigorous requirements for obtaining a search warrant supply ample pre-deprivation protection for criminal suspects and their housemates alike. And once the property has lawfully been taken, the relevant objective is to supply sufficient information not for a hearing but to direct the individual where to go to retrieve the property. Here, that was done, and nothing in this record indicates that the name of the court and judge with custody over the property would be -- or in fact was -- insufficient to obtain return of the property.

Under these circumstances, no further notice of State-law hearings, procedures or any other information was constitutionally required. Just as State and local governments need not tell citizens about the requirements of the Fourth Amendment every time they complete a search and seizure, they need not identify each and every provision of State law regarding such seizures. The reason is straightforward: Citizens are "presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). *See Federal Crop Ins. v. Merrill*, 332 U.S. 380, 384 (1947) ("everyone is charged with knowledge of the United States Statutes at Large").

Confirming the point is *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), which applied this venerable principle to circumstances far more trying to individual property interests than this one. At stake in *Short* was the validity of a State law extinguishing mineral interests after 20 years unless the owner filed a statement of claim. Even though the State did not directly notify the property owner about this provision, even though the individual did not in fact know about its existence and even though the individual's property interest ultimately lapsed under the law, the Court held that the law did not violate the notice requirements of due process. "Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id.* at 532. A similar conclusion applies here. Respondents had at their disposal a law that would have afforded them all the relief they sought. Their ignorance of that law, like ignorance of the law generally, does not make out a constitutional case. *See North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when the procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it").

By trying to engraft additional procedural requirements on the retrieval of seized property, moreover, the lower court threatens to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Parratt*, 451 U.S. at 544. Many States have well-established procedures for return of property seized in a search, *see* Appendix, with some predating passage of the Fourteenth Amendment, *see, e.g.*, J. Swan & L. Critchfield, I Revised Statutes of Ohio, 815 (1860). The State laws fall into two general categories -- those in which the seized property can be returned only by an order of court, and those in which there are

mechanisms other than a court order for the release, usually by application to the police or prosecutor. A sudden gloss on due process that requires notice of every such procedure, whether provided by State or local law, threatens to place State and local governments in the difficult if not impossible position of having to catalog each of these laws.

Worse yet, the lower court's decision punishes State and local governments for enacting these well-meaning laws in the first instance. It thus "discourages" the "desirable development" of enacting laws to govern these issues: "States may avoid creation of" these due process rights "by having scarcely any regulations, or by conferring standardless discretion" on its law enforcement and judicial personnel. *Sandin v. Connor*, 515 U.S. 472, 132 L.Ed.2d 418, 429 (1995). In the end, most States have responsibly enacted laws or adopted procedures for property retrieval, which all persons are charged with knowing and which should not be displaced by a federalized tort law, save under the most compelling circumstances. No such circumstance exists here.

III. Individuals Must Assert Their Procedural Rights Under State Law Before Filing A Due Process Claim.

Not only must individuals be held to notice of the available State law concerning return of their property, they also must exercise their rights under that law before resorting to due process. A person may not ignore an existing procedural remedy, then file suit to enforce that remedy in the name of due process. Respondents, in short, were not denied a remedy, and its existence was not hidden from them. They simply chose to ignore it.

In this respect, respondents sit in the same position as the claimants in *Walker v. Birmingham*, 388 U.S. 307 (1967). Faced

with an injunction forbidding them from engaging in a public march, the protesters declined to apply for a parade permit or undertake a judicial challenge to the injunction. *Id.* at 311. They instead marched, were cited for contempt, and filed a civil rights action under section 1983. *Id.* at 312. In affirming the dismissal of the suit, the Court held that it could not review the illegitimacy of a permit issuing process that was never invoked. *Id.* at 318. So it is here. Respondents never invoked the California statute that entitled them to the very property they now seek.

In the final analysis, respondents were on notice that they needed a court order to get their property back. Instead of following that statutory post-deprivation process and instead of obtaining the relief it provides, they took a different course. They filed a due process claim against the city. That is not the route the Court has prescribed in this area. The lower court's contrary conclusion accordingly should be reversed.

CONCLUSION

For the foregoing reasons, the amici States respectfully urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

STATE AND TERRITORIAL STATUTES REGARDING THE RETURN OF SEIZED PROPERTY

State	Statute or other cite
Alabama	Ala. Code § 15-5-16; Ala. R. Crim. P. 3.13
Alaska	Ak. Stat. § 12.36.020
Arizona	A.R.S. § 13-3922
Arkansas	Ark. R.Crim. P. Rule 15.1-15.5 (1998)
California	Calif. Ann. Pen. Code §§ 1536, 1540
Connecticut	C.G.S. § 54-36a
Delaware	Del. Stat. Ti. 11 § 2311
District of Columbia	D.C. Stat. § 23-525
Florida	Fl. Stat. § 933.14
Georgia	Ga. Stat. 17-5-50, 54
Guam	8 G.C.A. § 150.20 - .30
Idaho	Id. Stat. § 19-4414

Indiana	Ind. Code Ann.35-33-5-5; *Tracy v. State*, 655 N.E.2d 1232
Iowa	Ia. Stat. §§ 809.3 through 809.13
Kansas	Ks. Stat. § 22-2512
Louisiana	La. C.Cr. P. Art. 167; R.S. 15:41
Maine	Me. R. Crim Pro. 41
Massachusetts	Mass. G.L. c. 276 § 3; Sup. Ct. R. 61; *Commonwealth v. Sacco* 401 Mass. 204 (1987)
Maryland	Md. Ann. Code art.27, § 551; *Chu v. Anne Arundel County*, 537 A.2d 250 (1988)
Michigan	MI St. 780.655 § 5
Minnesota	Minn. Stat. 626.04; 626.21; *State v. Davidson*, 471 N.W. 2d 691 (Minn. Ct. App. 1991) *rev'd on other grounds*, 481 N.W. 2d 51 (Minn. 1992)
Mississippi	*Newman v. Stuart* (1922 Miss) 597 So. 2d 609.
Missouri	Mo. Stat. 542.301

Montana	Mont. Code Ann. § 46-5-312
Nebraska	Ne. Stat. § 29-818-820
Nevada	Nev. Stat. 179.105
New Hampshire	N.H. Stat. § 595-A:6
New Jersey	N.J. Stat. Ann. 2C:64-1 et seq.; N.J. Ct. R. 3:5-7(a); *Dragutsky v. Tate*, 620 A. 2d 1065 (App. Div. 1993)
New Mexico	Sec. 29-1-13 &-14 N. M. Stat. Ann., 1978 Comp. (1984); Rule 5-212(A), N.M. Rules Ann., 1998 Ed.
North Dakota	N.D. Code § 29-31.1-02 N.D. R. Crim. P. 41
North Carolina	N.C.G.S. § 15-11.1; N.C.A.G. (July 19, 1994)
Oklahoma	22 Okl. St. § 1232
Oregon	Or. Stat. § 133.633
Pennsylvania	Pa. R. Crim Pro. 324
Rhode Island	RI Stat. § 12-5-7
South Dakota	S.D. Stat. § 23A-37-4; § 23A-37-8.

Texas	Tx C.C.P. Art. 18.17
Utah	Utah Code Ann. 77-24-1.5
Virginia	Va. Stat. § 19.2-58, 60; *see also,* 19.2-54
Washington	Wash. Crim. R. 2.3(e)
Wisconsin	Wi. Stat. § 968.20
Wyoming	Wy. Stat. § 7-7-103